90-1434

Supreme Court, U.S.
FILED
JAN 23 1991
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

Term: October, 1990

DAVID L. PRIDE, et al. See Part B for a complete list of the one hundred eleven (111) plaintiffs,

Plaintiffs-Appellants,

v.

VENANGO RIVER CORPORATION, ILLINOIS CENTRAL GULF RAILROAD COMPANY, IC INDUSTRIES INCORPORATED, also known as WHITMAN CORPORATION, HARRY BRUCE, HENRY BORGSMILLER and RICHARD BESSETTE,

Defendants-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FROM THE UNITED STATES SEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

AMIEL CUETO
CUETO & CUETO, Ltd.
The above attorney is counsel of record for plaintiffs-appellants and service can be had at:
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Other attorneys from the firm of Cueto & Cueto Ltd. who may assist the above attorney of record in the present case are Christopher Cueto and Thomas Daley

(A) QUESTIONS PRESENTED:

I. Does the use of a generic term such as "Plaintiffs" or "Defendants" in a notice of appeal meet the requirements of Rule 3 of the Federal Rules of Appellate Procedure.

II. Assuming the use of a generic term such as "Plaintiffs" or "Defendants" in a notice of appeal does not meet the specificity requirements of Rule 3 of the Federal Rules of Appellate Procedure, is such a defect cured when all parties are individually identified to the appellate court within 30 days of the order appealed from.

(B) LIST OF ALL PARTIES

DAVID L. PRIDE, ROBERT D WARNER,)
VINCENT CHANDLER, P.L. FOURCAULT,)
TERRY L. RIGGS, DENNIS HEERIN,)
JAMES P. WALDRON, BUFORD R. CLARKE,)
JR., LOU A. JETHRO, LAVERNE LUTHY,)
ALAN HAGLER, JAMES W. JACKSON,)
NORMAN F. JOHNSON, MERL L.)
PENROD, FRANK A WOOLF, JR.,)
NORMAN W. LANGE, LINDELL R. GOTTO,)
J.D. LEWIS, KENNETH COLEMAN,)
F.E. GRISSON, LARRY R. GREENWOOD,)
MICHAEL L. VALENTINE, FORREST)
NELSON, ROBERT HOOTEN, RONALD L.)
WHITAKER, CONRAD N. ARNOLD, DONALD)
D. WILLIAMS, GEORGE R. VINSON,)
WILLIAM L. BECKER, LEROY SHEA,)
LARRY D. HARPER, H.C. GREENLEY)
L.E. HARTLINE, T.G. CAMPBELL,)
WARREN E. LAWRENCE, DAVID LEUTY,)
WILLIAM M. MILLER, THEODORE J.)
WIDEL, RORY G. PERRY, S. JOHNSON,)
VERNON J. LEE, JAMES R. MAYS,)

E.D. DORSON, J.E. HARRISON,)
ARCHIE L. WATTS, JR., WILLIAM H.)
LEE, NORMAN F. RUF, MARK S.)
NICHOLSON, JAMES E. BOATRIGHT,)
G.E. ISOM, RONNIE D. ELLET,)
DONALD E. BROYLES, JERRY W. BLAIR,)
BILLY C. TURNER, HAROLD L. MASSLEY,)
EUGENE WILLIAMS, ELMER W. GRISSOM,)
DENNIS J. EDWARDS, ROBERT E.)
LITTLE, MICHAEL W. HUTSCH, EUGENE)
A. HARPER, JOHN H. MCKINNEY,)
ROBERT S. SCHLEGEL, RUSSELL H.)
DOSSETT, NORMAN E. MCDONALD,)
DANIEL C. PICAR, DENZIL L.)
ARNOLD, RUSSELL E. ABCED, JON R.)
SMITH, ROBERT F. SCHLEGEL, MARION)
W. DEPPE, WILLIE A. LOCKETT,)
JAMES CARLISLE, MANUEL L. RAMIREZ,)
D. L. VINYARD, LARRY W. FREY,)
R.D. PUTERBAUGH, ROGER P. KING,)
JOHN A. MEYER, ERNEST C. WHALEN,)
WAYNE P. PUTERBAUGH, MICHAEL E.)
WRIGHT, G.W. KRATZ, D.V. ARVIN,)
R.J. THOMASON, RUSSELL L. STARKEY,)
DALE QUANTE, BILL DANIEL, JAMES)
ASTROWSKI, RAYMOND L. RICHIE,)
E.L. MCDANIEL, GEORGE W. NANCE,)
STEVEN P. BLACK, M.D. LORTON,)
E.C. GODDARD, JOHN N. ANTHONY,)
DONALD E. MURRY, LEWIS D. CURRENT)
LARRY D. FLATT, RAYMOND STENGEL,)
TOMMY W. COOK, MICHAEL A. BONE,)
MICHAEL W. CHEEK, BARNEY E.)
HALL, WILLIAM C. CONRAD, CHARLES)
STALLINGS, DONALD BATIS, ROGER)
L. STEGMAN, JOSEPH SCHROETER,)
T. J. AKINS and J.P. LEMP,)

Plaintiffs-Appellants,

v.

VENANGO RIVER CORPORATION, ILLINOIS CENTRAL GULF RAILROAD COMPANY, IC INDUSTRIES, INCORPORATED, also known as WHITMAN CORPORATION, HARRY BRUCE HENRY BORGSMILLER and RICHARD BESSETTE,

Defendants-Appelles.

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(D) A REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES.

There was no administrative agency reports, official or unofficial, delivered in the case. The October 25, 1990 opinion of the Seventh Circuit, from which review is sought herein, is contained in the appendix as is the opinion of the United States District Court for the southern district of Illinois rendered May 10, 1989, in this cause.

(E) JURISDICTIONAL GROUNDS

(i) The Seventh Circuit judgement sought to be reviewed herein was entered on October 25, 1990.

(ii) No order respecting rehearing was sought or entered. No order regarding an extension of time in which to file a petition for writ of certiorari was sought or entered.

(iii) No express reliance upon Rule 12.3 is at issue.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 U.S.C. §1254.

(F) THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE AT THIS POINT:

Federal Rule of Appellate Procedure, Rule 3(c):

Rule 3. Appeal as of Right - How Taken

> **(c) Content of the Notice of Appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgement, order or part thereof appealed from; and shall name the

court to which the appeal is taken. Form 1 in the Appendix of forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(G) STATEMENT OF THE CASE.

The jurisdiction of the district court, although challenged, was based upon the existence of a federal question under 28 U.S.C. §1331. The federal statute involved was the Racketeering Influenced Corruption Act (RICO), 18 U.S.C. §§1961 et. seq. This petition, however, presents no questions regarding either of these statutes.

The plaintiffs herein are one hundred and eleven employees of the Chicago, Missouri and Western Railway Company ("CMW"). They filed suit in the southern district of Illinois against the various defendants, alleging they were the victims of RICO violations, which resulted in the loss of seniority rights and employment benefits. On May 10, 1989, the district dismissed the complaint on the ground that section 153 (i) of the Railway Labor Act, 45 USC §151 et. seq. preempted the claim and the National Railway Adjustment Board had exclusive jurisdiction over the dispute. (Appendix p. 8-16)

On May 18, 1989, the Plaintiffs filed the following notice of appeal:

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID L. PRIDE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 89-5012
	)	
VENANGO RIVER CORPORATION, et al.,	)	
	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Come now the plaintiffs by their attorney, Amiel Cueto, and pursuant to Federal Rule of Appellate Procedure Chapter 133, §2107 hereby notices that the plaintiffs are appealing to the U.S. Seventh Circuit Court of Appeals from the judgement and order entered by the U.S. District Court, the Honorable William Beatty, on May 10, 1989, dismissing the plaintiffs' entire case with prejudice. A copy of Judge Beatty's order is attached hereto and incorporated herein by reference. (Appendix p.7)

The body of that notice refers to plaintiffs, plural, three times. Attached to the notice of appeal and incorporated by reference, was the district court's May 10, 1989, order dismissing the claim. The caption of that order identified the plaintiffs as "David Pride, et al.", and listed each defendant. On the first page of the body of that order, incorporated by reference to the notice of appeal, the plaintiffs are identified as 111 current employees of the Chicago, Missouri, and Western Railway Co. Similarly, the body of the order again lists each defendant.

On May 31, 1989, within the thirty days of district court's May 10, 1989, dismissal, the plaintiffs filed a certificate of interest which listed the names of all 111 individual plaintiffs. (Appendix p. 17-21) It can be objectively demonstrated that the Seventh Circuit was aware of each of the 111 plaintiffs because its order establishing oral argument lists each by name. (Appendix p. 22-25) After oral argument on the merits, the Seventh Circuit asked for briefs on the sufficiency of the notice of appeal in light of Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405 (1988).

Torres involved one of sixteen plaintiffs who claimed employment discrimination. The district court dismissed the suit. The notice of appeal challenging this dismissal listed fifteen of the intervening plaintiffs, but wholly omitted, due to a secretary's error, the plaintiff Torres. The Court of Appeals ultimately remanded the case on the merits as to the fifteen named plaintiffs. Summary judgement was granted against Torres for his failure to

appeal. The Supreme Court held that the use of the term "et. al." in the style of a notice of appeal would not save the omission of Torres, a would be appellant who had, in no fashion, notified the appellate court of his would be inclusion in the appellate process.

The crucial factor in deciding whether Torres had properly perfected his appeal was not that the sixteen plaintiffs had been designated as appellants by reference, as is clearly the case here, but that fifteen of the plaintiffs had been specifically listed in the body of the notice of appeal, while Torres was not listed as an appellant in any fashion. As the Supreme Court noted, "Both the notice of appeal and the order of the Court of Appeals (remanding) omitted petitioner's name. It is undisputed that the omission in the notice of appeal was due to a clerical error on the part of a secretary employed by petitioner's attorney." Torres, 487 U.S. 315, 108 S.Ct. at 2407.

The Court summarized it's holding that Torres' belated attempt at filing a notice of appeal was insufficient with the following language:

> Petitioner did not file the functional equivalent of a notice of appeal; he was never named or otherwise designated, however inartfully, in the notice of appeal filed by the 15 other intervenors... Thus, the Court of Appeals was correct that it never had jurisdiction over petitioner's appeal. Torres, 487 U.S. at 317, 108 S.Ct. at 2409. Emphasis supplied.

Relying upon post-Torres precedent from the Sixth and Ninth Circuit, Ford v. Nicks 866 F.2d 865 (6th Cir. 1989), and Natl. Center for Immigrant Rights v. I.N.S., 892 F.2d 814 (9th Cir.1989), the present plaintiffs argued that the use of a generic term such as "plaintiffs" or "defendants" satisfied the specificity requirement of Rule 3 of the Federal Rules of Appellate Procedure, as interpreted by Torres.

Additionally, and/or alternatively, the plaintiffs argued that any defect in the notice of appeal was cured when, within the thirty-day period in which the notice of appeal could be filed, a certificate of interest was filed which listed each of the one hundred eleven plaintiffs. This certificate of interest was suc-

cessful in apprising the appellate court of the identity of each the plaintiffs within the time for appealing the district court's order. This fact can be objectively demonstrated by looking at the order setting oral argument in which each plaintiff is listed. As support for this proposition, the plaintiffs relied upon a Fifth Circuit case, Broth. of Ry. Carmen v. Atchison, Topeka & Santa Fe, 894 F.2d 1463 (5th Cir. 1990).

In this case six unions filed a notice of appeal in which one union was listed specifically while the other five were designated only as "et.al." The Fifth Circuit noted that, under Torres, the designation "et.al." was insufficient to confer appellate jurisdiction as to the unnamed unions. However, the Fifth Circuit decided this defect was cured when, within thirty days of the order appealed from, all six unions were listed in a Memorandum in Support of Appellants' Motion for Injunction Pending Appeal. The Fifth Circuit concluded, "In sum, within the thirty day period in which notice of appeal may be filed, all six unions seeking to appeal were clearly identified to both the appellees and the court. Thus, the required notice was provided within the thirty day period prescribed and the notice purposes of Rule 3(c) were served." Broth. of Ry. Carmen, 894 F.2d at 1465.

On October 25, 1990, the Seventh Circuit dismissed the present plaintiffs' appeal, holding that their notice of appeal was defective under the Circuit's interpretation of Rule 3 of Fed. R. App. P. 3(c) and Torres. The Seventh Circuit's opinion simply did not address the issue of whether a generic term such as "plaintiffs" or "defendants" complies with Rule 3(c) and Torres. Thus, the opinion fails to acknowledge its split with the Sixth Circuit in Ford v. Nicks, 866 F2d 865 (6th Cir. 1989) and the Ninth Circuit in Natl. Center for Immigrant Rts v. I.N.S., 892 F.2d 814 (9th Cir. 1989).

The opinion does acknowledge that no one disputed the actual identity of the appellants:

> While none of the parties dispute the identity of the intended appellants, the Supreme Court found in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), that actual confusion is not a prerequisite to

> a dismissal for failure to strictly comply with Rule 3(c)'s naming requirement. We have noted that "Torres changed the law in this circuit. It requires us to insist on punctilious, literal, and exact compliance . . ." with Rule 3(c). Allen Archery, Inc. v. Precision Shooting Equip., Inc., 857 F.2d 1176, 1177 (7th Cir. 1988); see also Barnett v. Stern, 909 F.2d 973, 977 (7th Cir.1990); Baucher v. Eastern Ind. Prod. Credit Ass'n, 906 F.2d 332, 333-34 (7th Cir. 1990); FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 577 (7th Cir.), cert. denied, 110 S. Ct. 366 (1989); Bigby v. City of Chicago, 871 F.2d 54, 57 (7th Cir. 1989).

The opinion then goes on to rely upon the prior Seventh Circuit cases of Allen Archery and Bigby for its holding. Allen Archery held that the omission of a party's name in the body of a notice of appeal was not cured by the inclusion of his name in the caption. Bigby held that a notice of appeal in which the body of the notice of appeal described the appellants as "plaintiffs and Intervening plaintiffs" was defective, although the Seventh Circuit chose not to comment on its split with sister circuits on this question.

The Seventh Circuit also concluded that any defects in the notice of appeal were not cured by the filing of a certificate of interest which apprised the court of the identity of each plaintiff within the thirty days in which to file their notice of appeal. In rejecting the plaintiffs' argument on this point, the Seventh Circuit candidly acknowledged its rejection of the Fifth Circuit's approach in Broth. of Railway Carmen v. Atchinson, Topeka and Santa Fe Ry., 894 F.2d 1463 (5th Cir. 1990), cert. denied No. 90-17 (Oct. 1, 1990). The opinion appealed from herein directly challenges the Fifth Circuit's approach:

> In their brief, appellants claim that their case is distinguishable from Bigby in that any failure to comply with Rule 3(c) was cured when they filed a certificate of interest that listed all of the 111 plain-

tiffs. As support for their argument, plaintiffs rely on Brotherhood of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry., 894 F.2d 1463 (5th Cir. 1990), cert. denied, No. 90-17 (Oct. 1, 1990). In Carmen, six unions filed a notice of appeal in which one union was specifically listed while the other five were designated only as "et al" The Fifth Circuit recognized that under Torres, the "et al." desingation did not confer jurisdiction over the unnamed appellants. Nonetheless, the court ruled that the appellants cured this defect by listing all six unions in a Memorandum in Support of Appellants' Motion for Injunction Pending Appeal within the thirty-day period in which the notice of appeal could be filed. Id. at 1465. The court conceded that it was overlooking the "letter" of Rule 3(c)'s specificity requirement. Id. at 1465 n.3.

That the Fifth Circuit has chosen to interpret Rule 3(c)'s specificity requirement loosely, however, does not exempt appellants from this circuit's interpretation of Rule 3(c) and Torres. The Fifth Circuit cited the following language in Torres as support for its interpretation of Rule 3(c):

> [I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

Carmen, 894 F.2d at 1465 (quoting Torres, 487 U.S. at 317). The Fifth Circuit, however, failed to consider the crucial sentence in Torres following the quoted statement: "But although a court may construe the Rules liberally in determining whether they

have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." Torres, 487 U.S. at 317. Two years before Carmen was decided, we construed the same passage from Torres that the Fifth Circuit later relied upon and arrived at a contrary conclusion based on its context:

> [T]he statement, insofar as it pertains to Rule 3(c), is designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent. It is not designed for the case - this case and Torres - where the litigant has filed a notice of appeal and failed to name all the appellants. A defective notice of appeal is not the functional equivalent of a notice of appeal.

Allen Archery, 857 F.2d at 1177. The appellants have not persuaded us that our interpretation of Rule 3(c) and Torres in Allen Archery and Bigby was mistaken.

This writ followed.

(I) The statement of the case sets out, in the first paragraph, the basis for federal jurisdiction in the court of first instance.

(J) Why the Supreme Court should take this case.

This case deserves the attention of the Supreme Court because it effectively frames the split among the various circuits as to what description of parties in a notice of appeal passes the specificity requirement of Rule 3(c) of Fed. R. App. P. 3(c) and Torres. Torres held that the use of the term "et. al." in the style of a notice of appeal would not save the omission of a would be

appellant who had not, in any method, fashion, or way, notified the appellate court of his inclusion in the appellate process. Certainly all would agree with this reading of the Torres case. Beyond that, however, the circuits are at odds over what Torres requires and what Rule 3(c) of the Fed. R. App. P. Rule 3(c) actually means. For this reason, the Supreme Court needs to revisit Rule 3(c) and further illustrate what rationale motivated Torres. Without such guidance, the Circuits will continue to apply a fundamental Rule of Appellate Procedure in completely opposing ways.

The split between the circuits as to what Rule 3(c) and Torres require in a notice of appeal is not exaggerated. Certainly the notice of appeal at issue herein would have sufficed to confer jurisdiction in the Sixth and Ninth Circuits. The case of Natl. Center for Immigrants Rights v. I.N.S., 892 F.2d 814 (9th Cir. 1989) is directly on point. In this case, the Ninth Circuit considered whether jurisdiction was conferred by a notice of appeal which stated in the body, "Notice is hereby given that the defendants in the above-referenced action hereby appeal to the United States Court of Appeals for the Ninth Circuit." Natl. Center, 892 F.2d at 815. The caption of the notice listed, as in the present caption, one plaintiff followed by the designation "et al." and one defendant followed by the same designation. Id. Relying upon the Sixth Circuit case of Ford v. Nicks, 866 F.2d 865 (6th Cir. 1989), the Ninth Circuit made short work of the notion that this designation of the parties was insufficient to confer jurisdiction:

> We hold that Torres does not require that the individual names of the appealing parties be listed in instances in which a generic term, such as plaintiff or defendants, adequately identifies them. We find the reasoning of the Sixth Circuit in Ford v. Nicks, 866 F.2d 865, 870 (6th Cir. 1989), on this point persuasive. The body of the notice in Ford stated that "[n]otice is hereby given that the defendants' appeal to the United States Court of Appeals for the Sixth

Circuit . . . ." Id. at 869. The court reasoned that "[t]here are some 18 defendants, and the statement that 'the' defendants are taking the appeal gives fair notice that all 18 desire to be appellants, not just some of them . . . We think it would be manifestly improper for us to read the words 'the defendants,' in the body of the instant notice, as meaning Chancellor Roy S. Nicks only. The other defendants may have been designated somewhat 'inartfully,' to borrow the adverb used in Torres, but to say that they were not designated at all would be untrue," Id. at 870.

Following the reasoning of Ford, we find that the notice of appeal here is also proper. Although the caption reads "Immigration and Naturalization Service, et al.," the body of the notice reads "[n]otice is hereby given that defendants in the above-referenced action hereby appeal . . . ." It is sufficiently clear from the body of the notice that all of the defendants are seeking to appeal. While their intentions might arguably have been clearer had the defendants used the article "the" in front of the word "defendants," the omission of the article does not require a different result from that reached by the Sixth Circuit. Defendants, in its normal usage, means all defendants not just some. Had only some defendants intended to appeal, the proper term would be used in the body of the notice would have been "certain defendants." Alternatively, if only some defendants desired to appeal, those defendants could have identified themselves individually. As stated by the Advisory Committee Notes on the 1979 amendment, "so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with." Id. at 870. As was the case in Ford, " 'the function of notice' was met as to each of the defendants in this case;" therefore, this court has jurisdic-

tion over the appeal and over each of the defendants.

The suggestion raised by appellees of want of jurisdiction and appropriateness of dismissal is hereby rejected. Natl. Center for Immigration Rights, 892 F.2d at 816-817.

The Seventh Circuit opinion appealed from herein rejects the approach from the Sixth and Ninth Circuits, although it does not discuss those cases specifically. As previously discussed, the Seventh Circuit was candid in confronting the difference between it and the Fifth Circuit, regarding whether or not a defective notice can be cured by a collateral document which explicitly identifies all parties within 30 days of the order appealed from. In Broth. of Ry. Carmen v. Atchison, Topeka & Santa Fe, 894 F.2d 1463 (5th Cir. 1990) the Fifth Circuit answered that a defective notice could be cured. In the present case, the Seventh Circuit answered that a defective notice could not be so cured.

Thus, a notice of appeal which was found wanting in the Seventh Circuit, would clearly have been sufficient in the Fifth, Sixth, and Ninth Circuits. This is intolerable. Of all legal rules which should enjoy uniform application, rules of procedure may be the most important. If lawyers and litigants cannot expect straightforward and uniform application of those procedural rules which determine if a case is to be heard on the merits, then one more brick is added to the wall of cynicism and distrust which doubts the ability of courts to deal with like disputes in a like manner.

CONCLUSION

This case highlights the split among the Fifth, Sixth, Seventh, and Ninth Circuits as to what does, or does not, satisfy the specificity requirement of Rule 3(c) of the Fed. R. App. P. and the important Torres decision of this court. Presently, these circuits are interpreting the specificity requirement of Rule 3(c) in widely disparate ways. For this reason, the Supreme Court should step in and settle this issue.



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APPENDIX

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In the

United States Court of Appeals

For the Seventh Circuit

No. 89-2070

DAVID L. PRIDE, et al.,

Plaintiffs-Appellants,

v.

VENANGO RIVER CORPORATION,
ILLINOIS CENTRAL GULF RAILROAD COMPANY,
IC INDUSTRIES, INCORPORATED, also known as
WHITMAN CORPORATION, HARRY BRUCE,
HENRY BORGSMILLER, and RICHARD BESSETTE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois, East St. Louis Division.
No. 89 C 5012—**William L. Beatty, *Judge.***

ARGUED DECEMBER 13, 1989—DECIDED OCTOBER 25, 1990

Before WOOD, JR., COFFEY, and RIPPLE, *Circuit Judges.*

WOOD, JR., *Circuit Judge.* Plaintiffs' first amended complaint alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, when they engaged in a scheme to defraud the plaintiffs of their seniority rights and other employment benefits. The district court granted the defendants' motions to dismiss on the ground that section 153(i) of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, pre-

empted the plaintiffs' claims and gave the National Railway Adjustment Board exclusive jurisdiction over the parties' dispute.

Subsequent to oral argument, we observed a serious defect in the plaintiffs' notice of appeal and requested additional briefing.[1] The defective notice of appeal reads in its entirety as follows:

> IN THE UNITED STATES DISTRICT COURT
> FOR THE SOUTHERN DISTRICT OF ILLINOIS
>
> DAVID L. PRIDE, ET AL.,)
>)
> Plaintiffs,)
>)
> v.) No. 89-5012
>)
> VENANGO RIVER COR-)
> PORATION, ET AL.,)
>)
> Defendants.)
>
> NOTICE OF APPEAL
>
> Come now the plaintiffs by their attorney, Amiel Cueto, and pursuant to Federal Rule of Appellate Procedure Chapter 133, § 2107 hereby notices that the plaintiffs are appealing to the U.S. Seventh Circuit Court of Appeals from the judgement and order entered by the U.S. District Court, the Honorable William Beatty, on May 10, 1989, dismissing the plaintiffs' entire case with prejudice. A copy of Judge Beatty's order is attached hereto and incorporated herein by reference.

Federal Rule of Appellate Procedure 3(c) requires that "the notice of appeal shall specify the party or parties

[1] The plaintiffs-appellants requested additional oral argument on the issue of this court's jurisdiction when they submitted their supplemental brief. Upon consideration of the briefs and the record, we find that additional argument is unnecessary and therefore deny the request for oral argument.

taking the appeal . . . ." The issue that concerned us was whether the identification of the appellants in the text of the notice of appeal as "the plaintiffs" and the caption's reference to "David L. Pride, et al." satisfied the specificity requirement of FED. R. APP. P. 3(c).

While none of the parties dispute the identity of the intended appellants, the Supreme Court found in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that actual confusion is not a prerequisite to a dismissal for failure to strictly comply with Rule 3(c)'s naming requirement. We have noted that "*Torres* changed the law in this circuit. It requires us to insist on punctilious, literal, and exact compliance . . ." with Rule 3(c). *Allen Archery, Inc. v. Precision Shooting Equip., Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988); *see also Barnett v. Stern*, 909 F.2d 973, 977 (7th Cir. 1990); *Baucher v. Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332, 333-34 (7th Cir. 1990); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 577 (7th Cir.), *cert. denied*, 110 S. Ct. 366 (1989); *Bigby v. City of Chicago*, 871 F.2d 54, 57 (7th Cir. 1989).

In *Torres*, the petitioner was one of sixteen plaintiffs who intervened in an employment discrimination suit. The district court dismissed the complaint under FED. R. CIV. P. 12(b)(6) for failure to state a claim warranting relief. All sixteen plaintiffs wished to appeal, but due to a clerical error on the part of the petitioner's attorney, plaintiff Jose Torres's name was omitted from the notice of appeal. Torres argued that the Court should regard the use of "et al." in the notice of appeal as an adequate expression of his intention to appeal. The Court found that such a vague designation did not provide adequate notice to either the opposition or the court of the identity of the appellants. *Torres*, 487 U.S. at 318. Furthermore, the Court found that the omission of Torres's name in the notice of appeal amounted to a failure to appeal that deprived the appellate court of jurisdiction. *Id.* at 314, 317.

We observed in *Allen Archery* that the individual appellant must "be named in the notice of appeal; naming

in the caption, or in collateral documents such as a supersedeas bond, will not do." 857 F.2d at 1177. The *Allen Archery* notice of appeal, appearing under a caption describing the case as "ALLEN ARCHERY, INC., Plaintiff" v. "PRECISION SHOOTING EQUIPMENT, INC. and PAUL E. SHEPLEY, JR., Defendants," stated that "Notice is hereby given that Precision Shooting Equipment, Inc., defendant, hereby appeals . . . ." We ruled that the omission of Shepley's name in the body of the notice of appeal was not cured by the inclusion of his name in the caption.

The notice of appeal in *Bigby v. City of Chicago*, 871 F.2d 54 (7th Cir. 1989), bore a caption reading "WILLIAM C. BIGBY, et al., Plaintiffs, and MAURICE THOELE, et al., Intervening Plaintiffs, vs. CITY OF CHICAGO and CHICAGO POLICE DEPARTMENT, Defendants." The body of the notice of appeal, however, stated simply that "Plaintiffs and Intervening Plaintiffs hereby appeal the order of the district court entered in this case on June 22, 1987." We found that because the body of the notice of appeal named none of the individuals taking the appeal, we lacked jurisdiction over any of the putative appellants. *Id.* at 57. The notice of appeal in this case exhibits the same deficiencies that led to a dismissal in *Bigby*.

Appellants urge that dismissal of their appeal for noncompliance with FED. R. APP. P. 3(c) "would have the ironic effect of penalizing a party for faithful compliance with Rule 10(a) of the Federal Rules of Civil Procedure." Rule 10(a) provides in part:

> In the complaint the title of the action shall include the names of all the parties, *but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.*

FED. R. CIV. P. 10(a) (emphasis added). There is no irony in finding that compliance with a rule applicable only to pleadings filed in district court, *see* FED. R. CIV. P. 1, does not satisfy the demands of procedural rules that ap-

ply only to appeals. Rule 3(c) expressly requires that a notice of appeal specify each party taking the appeal, just as FED. R. CIV. P. 10(a) requires that a complaint filed in district court contain the names of all the parties. If a plaintiff fails to comply with the naming requirement of FED. R. CIV. P. 10(a) before a statute of limitations runs, and an unnamed defendant is unaware that he is a party against whom the claim should have been brought, the plaintiff is foreclosed from amending the complaint to name the correct defendant. *Schiavone v. Fortune*, 477 U.S. 21, 30-32 (1986). Similarly, if an appellant does not comply with the naming requirement of FED. R. APP. P. 3(c) within the time allowed for filing an appeal, a court of appeals will lack jurisdiction over the unnamed appellant.

In their brief, appellants claim that their case is distinguishable from *Bigby* in that any failure to comply with Rule 3(c) was cured when they filed a certificate of interest that listed all of the 111 plaintiffs. As support for their argument, plaintiffs rely on *Brotherhood of Ry. Carmen v. Atchison, Topeka & Santa Fe Ry.*, 894 F.2d 1463 (5th Cir. 1990), *cert. denied*, No. 90-17 (Oct. 1, 1990). In *Carmen*, six unions filed a notice of appeal in which one union was specifically listed while the other five were designated only as "et al." The Fifth Circuit recognized that under *Torres*, the "et al." designation did not confer jurisdiction over the unnamed appellants. Nonetheless, the court ruled that the appellants cured this defect by listing all six unions in a Memorandum in Support of Appellants' Motion for Injunction Pending Appeal within the thirty-day period in which the notice of appeal could be filed. *Id.* at 1465. The court conceded that it was overlooking the "letter" of Rule 3(c)'s specificity requirement. *Id.* at 1465 n.3.

That the Fifth Circuit has chosen to interpret Rule 3(c)'s specificity requirement loosely, however, does not exempt appellants from this circuit's interpretation of Rule 3(c) and *Torres*. The Fifth Circuit cited the following language in *Torres* as support for its interpretation of Rule 3(c):

> [I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.

Carmen, 894 F.2d at 1465 (quoting *Torres*, 487 U.S. at 317). The Fifth Circuit, however, failed to consider the crucial sentence in *Torres* following the quoted statement: "But although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres*, 487 U.S. at 317. Two years before *Carmen* was decided, we construed the same passage from *Torres* that the Fifth Circuit later relied upon and arrived at a contrary conclusion based on its context:

> [T]he statement, insofar as it pertains to Rule 3(c), is designed for the case where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent. It is not designed for the case—this case and *Torres*—where the litigant has filed a notice of appeal and failed to name all the appellants. A defective notice of appeal is not the functional equivalent of a notice of appeal.

Allen Archery, 857 F.2d at 1177. The appellants have not persuaded us that our interpretation of Rule 3(c) and *Torres* in *Allen Archery* and *Bigby* was mistaken.

In *Allen Archery*, we unequivocally stated that naming a party in the caption of the notice of appeal or in collateral documents will not satisfy the specificity requirement of Rule 3(c), 857 F.2d at 1177, and warned future appellants that "[t]he appellant must be named in the notice of appeal; naming him in the caption, or in collateral documents . . . , will not do." *Id.* The education that *Bigby* gave to potential appellants regarding compliance with FED. R. APP. P. 3(c) also arrived in time to aid the ap-

pellants here: *Bigby* was decided on March 7, 1989, and the *Pride, et al.*, notice of appeal was filed on May 18, 1989. While we have since determined that a notice of appeal specifying *every* appellant in the caption passes muster under Rule 3(c), *see Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, No. 89-2920, slip op. at 8 (Sept. 18, 1990), we summarized our case law as standing for the proposition that "where the caption and the body of the notice of appeal are ambiguous even when read together, it is inappropriate to consider as appellants parties named only in the caption." *Id.* at 7. Reading the caption and the body of the notice of appeal together in this case does not inform us who the "plaintiffs" are and who is included in "et al."

We therefore DISMISS this appeal for lack of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—10-25-90—500

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID L. PRIDE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 89-5012
	)	
VENANGO RIVER CORPORATION, et al.,	)	
	)	
	)	
Defendants.	)	

NOTICE OF APPEAL

Come now the plaintiffs by their attorney, Amiel Cueto, and pursuant to Federal Rule of Appellate Procedure Chapter 133, §2107 hereby notices that the plaintiffs are appealing to the U.S. Seventh Circuit Court of Appeals from the judgement and order entered by the U.S. District Court, the Honorable William Beatty, on May 10, 1989, dismissing the plaintiffs' entire case with prejudice. A copy of Judge Beatty's order is attached hereto and incorporated herein by reference.

_____

AMIEL CUETO
Attorney for Plaintiffs

CUETO, DALEY, WILLIAMS,
MOORE & CUETO, LTD.
Attorneys at Law
123 West Main St.
Belleville, IL 62220
618/277-1554

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DAVID L. PRIDE, ET AL.,	)
	)
Plaintiffs,	)
	)
- vs -	)No. 89 5012
	)
VENANGO RIVER CORPORATION, CHICAGO, MISSOURI AND WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY, IC INDUSTRIES, INC., HARRY BRUCE, HENRY BORGSMILLER, and RICHARD BESSETTE,	)
	)
Defendants.	)

ORDER

This matter is before the court on the defendants' motion to dismiss pursuant to Rules 9(b) and 12(b)(1) and (6) of the Federal Rules of Civil Procedure. Arguments were heard, briefs were submitted and the case was taken under advisement.

According to the First Amended Complaint, the plaintiffs are 111 current employees of Chicago, Missouri and Western Railway Company ("CMW").

The defendants are Venango River Corporation ("Venango"), Illinois Central Gulf Railroad Company ("ICG"), Whitman Corporation ("Whitman"), and Harry Bruce, Henry Borgsmiller and Richard Bessette ("The Individual Defendants"). The plaintiffs named CMW as a defendant in the original complaint. On Jaunary 21, 1989, the court granted the plaintiffs' voluntary motion to dismss CMW. In the First Amended Complaint CMW is not listed in the style of the complaint as a defendant. Nevertheless, throughout the First Amended Complaint the plaintiffs refer to CMW as defendant. The court will treat CMW as a defendant for purposes of this order.

Each of the defendants, with the understandable exception

of CMW, has submitted a motion to dismiss. While there are some differences reflecting each defendant's particular circumstances, the arguments are substantially similar. Accordingly, when the court refers to the "Defendants' Motion" it is treating all the motions collectively.

The plaintiffs filed suit pursuant to the Rackateer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 et seq. Essentially, the plaintiffs allege that they resigned from ICG and accepted employment with CMW when ICG sold approximately 600 miles of rail line to CMW. The plaintiffs further allege that ICG and the Individual Defendants induced CMW to buy the rail line by providing materially misleading traffic revenue data. After closing the sale with CMW, ICG allegedly breached its contractual obligation by deverting traffic and revenue away from CMW and by not assigning certain transportation contracts to CMW. As a consequence, CMW became insolvent and was, therefore, unable to satisfy its obligations to the plaintiffs. The plaintiffs' RICO complaint is premised on the fact that ICG and CMW engaged in a scheme to defraud the plaintiffs out of seniority rights and other employment benefits.

The defendants filed the instant motion to dismiss pursuant to Rules 9(b) and 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The defendants submitted three different arguments in support of their motion. They initially argue that this court lacks jurisdiction over the subject matter. They further argue that the plaintiffs lack standing to pursue a RICO claim against the defendants. Finally, the defendants contend that the plaintiffs have failed to state a RICO claim.

While a successful argument on any one of the three grounds would entitle the defendants to their motion to dismiss, this court will confine its analysis to whether it has subject matter jurisdiction.

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 et seq., grants the National Railway Adjustment Board ("NRAB") jurisdiction over all "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . . " 45 U.S.C. §153, First (i). The NRAB has exclusive jurisdiction over "minor" disputes. Atchinson, T & S.F. Ry. v. United Trans. Union, 734

F.2d 317 320 (7th Cir. 1984). It must, therefore, be determined whether the plaintiffs' allegations constitute a major or minor dispute.

"(A)lthough the distinction between major and minor disputes is central to the RLA, that distinction is imprecise and has plagued the courts and commentators over the years." Local 533, Transport Workers v. Eastern Airlines, 695 F2d 668, 673 (2nd Cir. 1982). It bears noting that the Railway Labor Act does not use the terms "major" and "minor" to distinguish disputes. The Supreme Court coined those terms in Elgin, Joliet, and Eastern Ry. v. Burley, 325 U.S. 711, 722-28, 65 S.Ct. 1282, 1289-1292 (1945). There the court then went on to define what constitutes a "major" or "minor" dispute:

> The first relates to disputes over the formation of collective agreement or efforts to secure them. They arise where there is no such agreement or whether it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claim to have vested in the past.
>
> The second class, however, contemplates the existence of a collective bargaining agreement concluded or, at any rate, a situation in which no effort is made to bring about a formal changes in terms of to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded on some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In neither case, the claim is to rights accrued not merely to have new ones created for the future. Id. at 723, 65 S.Ct. 1290.

"Thus, the test is whether the conflict can be resolved by reference to an existing agreement." Atchinson, T. and S.F. Ry. v. United Transp. U. 734 F.2d 317, 321 (1984). This test is necessary to protect jurisdiction of the NRAB and to promote the purposes of the Railway Labor Act. Union Pac. R. v. Sheehan,

439 U.S. 89, 94, 99 S.Ct. 399, 402 (1978).

Before this court are 111 plaintiffs who allege that they were fraudulently induced to resign from ICG and that they accepted new employment contracts with the CMW based on misrepresentations and threats made by defendants concerning the plaintiffs' employment alternatives and entitlements. The plaintiffs allege that they were illegally deprived of seniority rights and severance pay by ICG and that CMW is now able to satisfy its obligations to plaintiffs.

The facts in this case clearly indicate that this is a minor dispute. The plaintiffs are not attempting to acquire future rights, but rather they seek to assert rights claimed to have vested in the past. Accordingly, where "the dispute grows out of the employment relationship, and, in the final analysis, is an attempt to impose a right incident to that relationship, the statutory forum is the adjustment board, absent a clear expression of legislative policy to the contrary." Railway Labor Executive Ass'n v. Atchinson, T. and S.F. Ry., 430 F.2d 994, 997 (9th Cir. 1970), Cert. denied, 400 U.S. 1021 (1971).

The plaintiffs, in an admittedly brief reply to the defendants' motion argue that this case does not involve a "minor dispute" because allegedly the defendants have committed RICO violations. Not only are the plaintiffs guilty of begging the question, they have in fact not even addressed the proper question. A "minor" dispute does not become a "major" dispute simply because an otherwise "minor" dispute involves RICO allegations. "(A)n artful pleading cannot conceal the reality that the gravamen of the complaint (was) wrongful discharge." Magnuson v. Burlington Northern, 576 F.2d 1367, 1369 (9th Cir.), Cert. denied, 439 U.S. 930 (1978).

The proper question which this court must address, and one the plaintiffs have indirectly raised, is whether a "minor" dispute which would otherwise fall within the exclusive jurisdiction of the NRAB avoids the preemptive power of the RLA because it involves RICO allegations.

This court did not find a case specifically addressing the issue of whether a RICO claim may preempt the RLA. Nevertheless, many courts have used general federal law preemption standards in deciding RLA preemption questions E.G., Leu v. Norfolk and W. Ry., 820 F.2d 825 (7th Cir. 1987); Beers v.

Southern Pac. Transp., 703 F.2d 425 (9th Cir. 1983).

The plaintiffs rely on Farmer v. United Brotherhood of Carpenters, 490 U.S. 290, 97 S.Ct. 1056 (1977), for the proposition that the RLA does not preempt their claim. Farmer involved the National Labor Relations Act, but courts have considered the Farmer exception in the context of the RLA. E.G., Choate v. Louisville & N. R.R., 715 F.2d 369, 372 (7th Cir. 1983). The plaintiff in Farmer filed suit in state court alleging intentional infliction of emotional distress. The Court did not find that the NLRA preempted the claim because of the outrageous nature of the conduct at issue. The court considered the significant state interest involved, and the fact that the potential for interference with the federal labor scheme was slight and therefore concluded that preemption was not mandated. Id. at 297, 97 S.Ct. at 1062.

The plaintiffs here argue that there is a "substantial interest in allowing RICO victims to vindicate their rights through damages in tort. Such interest does not threaten undo (sic) interference with the RLS scheme. And Congress did not intend that exclusive jurisdiction should lie in the Railway Adjustment Board." Plaintiffs Br. at 3. This court disagrees with the plaintiffs. First, the "outrageous" conduct in Farmer which compelled the court to carve out an exception to the rule of preemption does not exist in the instant case. The duty which the defendants may owe to the plaintiffs arises from the collective bargaining agreement and not some independent state law duty. Moreover, the potential for interference with the federal labor scheme, in this case the RLA, is great and, therefore, an exception to preemption is not advisable. In weighing the potential for interference with the federal labor scheme, the Farmer Court noted that the state tort at issue was sufficiently separate from the labor dispute and, therefore, could be resolved without addressing issues directly related to a collective bargaining agreement. Additionally, the Seventh Circuit has held that preemption applies if adjudication of the claim would necessarily require interpretation of the collective bargaining agreement. Choate, 715 F.2d at 372.

Both the plaintiffs and the defendants rely on Butchers' Union Local No. 498 v. SDC Investment, 631 F. Supp. 1001 (E.D. Cal. 1986). The court there held that claims based on generic mail and wire fraud which otherwise fall within the exclusive jurisdiction of the NLRB will not lie under RICO, but

will be found to be preempted by the labor law. Id. at 1010. However, the court did note that jurisdiction is concurrent for violations of 29 U.S.C. §186, the only labor law listed as a predicate act in RICO. 29 U.S.C §186 deals with restrictions on payments and loans to labor organizations. In the instant case, the plaintiffs have alleged nothing more than generic wire and mail fraud and, therefore, we find that those claims are preempted by the RLA.

In the final analysis, the plaintiff' RICO claim is essentially a claim for wrongful discharge based on the defendants' allegedly fraudulent acts. The plaintiffs' claim flows from various collective bargaining agreements. Accordingly, even though the plaintiffs have alleged RICO violations, the RLA preempts those claims and therefore the NRAB has exclusive jurisdiction of this matter. Because this court lacks subject matter jurisdiction, we will not consider whether the plaintiffs have standing or whether the plaintiffs have properly set forth a RICO claim. Based upon the foregoing, IT IS HEREBY ORDERED that each of the defendant's motions to dismiss be granted.

DATED: This 10th day of May, 1989.

WILLIAM L. BEATTY
UNITED STATES DISTRICT JUDGE

JUDGEMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

DAVID L. PRIDE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 89-5012
	)	
VENANGO RIVER CORPORATION, et al.,	)	
	)	
	)	

❑ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been renendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against plaintiffs, upon defendants' motion to dismiss.

Dated May 10, 1989

Approved: William L. Beatty
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was mailed, postage prepaid, in a United States Mailbox in Belleville, Illinois, on this 16th day of May, 1989, to the following attorneys of record:

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KATHLEEN A. MOORE
CHRISTOPHER CUETO

May 31, 1989

Honorable Thomas F. Strubbe
Clerk of the U.S. Court of Appeals
219 South Deaborn St.
Chicago, Illinois 60604

Re: Pride, et al. v. Venango River Corp., et al.
No. 89-2070

Dear Sir:

Enclosed please find Appearance Form and Certificate of Interest which I ask that you file on behalf of the plaintiffs in the above-style cause. Copies have been forwarded this date to attorneys of record.

Thank you for your cooperation in this matter.

Very truly yours,
CUETO, DALEY, WILLIAMS,
MOORE & CUETO, LTD.

AMIEL CUETO

AC/jk
Enclosures

cc: William A. Schmitt
John P. Scotellaro
Kenneth E. Rechtoris
William J. Billeaud
Kenneth I. Jonson
Gregory Davis

APPEARANCE FORM

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

Appellate Court No.: 89-2070 Docketed on: 5/24/89

Short Caption: Pride, David L. et al. vs Venango River et al.

District Court Judge: William L. Beatty

District Court No.: 89 C 5012

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF;

David Pride, et al., plaintiffs-appellants as the
(party name)

{X} appellant(s) { } appellee(s) { } amicus curiae
{ } petitioner(s) { }respondent(s) { } intervenor(s)

Verify that the attorney, address and firm information, if any, is accurate. If incorrect strike through the incorrect information and record the correct information:

Name: Amiel Cueto
Title (If Any):
Firm, Office or Facility Cueto, Daley, Williams, Moore & Cueto
Unit, Division or Section:
Address: 123 W. Main St.
City, State Zip: Belleville, IL 62220
Firm or FTS Telephone Number:
Individual's Telephone Number (618) 277-1554
(if different from above)

Are you lead counsel in this appeal: X Yes __No

If you will participate in this case, you are required to sign and return this appearance form, accompanied by a "Certificate of Interest" pursuant to Circuit Rule 12d.

Amiel Cueto
(signature)

If you will not be participating in this case, but other counsel from the firm will appear, these attorneys' printed names with signatures should appear below:

Name:

Amiel Cueto
Thomas M. Daley
Christopher Cueto

If another firm will participate in this case, please provide attorney and firm address information as an attachment to this form.

CERTIFICATE OF INTEREST

CAUSE No. 89-2070

Short Title: David Pride, et al. v. Venango River Corp., et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information:

(1) The full name of every party or amicus the attorney represents in the case:

The undersigned represents all plaintiffs-appellants in this case. Please see attached list.

(2) If such party or amicus is a corporation:

i) Its parent corporation, if any:

n/a

ii) A list of its stockholders which are publicly held companies owing 10% or more of the stock in the party or amicus:

n/a

(3) The names of all law firms whose partners or associates have appeared for the party in the district court or are expected to appear for the party in this court:

Cueto, Daley, Williams, Moore & Cueto, Ltd.

This certificate shall be filed with the appearance form or upon the filing of a motion in this court, whichever occurs first. The text of the certificate (ie. caption omitted) shall also be included in front of the table of contents of the party's main brief.*

*If an attorney changes law firm affiliation after the filing of the main brief, an original and three copies of an amended certificate of interest mut be filed.

Attorney's Signature:_____

Date: May 30, 1989

DAVID L. PRIDE, ROBERT D WARNER,)
VINCENT CHANDLER, P.L. FOURCAULT,)
TERRY L. RIGGS, DENNIS HEERIN,)
JAMES P. WALDRON, BUFORD R. CLARKE,)
JR., LOU A. JETHRO, LAVERNE LUTHY,)
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BILLY C. TURNER, HAROLD L. MASSLEY,)
EUGENE WILLIAMS, ELMER W. GRISSOM,)
DENNIS J. EDWARDS, ROBERT E.)
LITTLE, MICHAEL W. HUTSCH, EUGENE)
A. HARPER, JOHN H. MCKINNEY,)
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DOSSETT, NORMAN E. MCDONALD,)
DANIEL C. PICAR, DENZIL L.)
ARNOLD, RUSSELL E. ABCED, JON R.)

SMITH, ROBERT F. SCHLEGEL, MARION)
W. DEPPE, WILLIE A. LOCKETT,)
JAMES CARLISLE, MANUEL L. RAMIREZ,)
D. L. VINYARD, LARRY W. FREY,)
R.D. PUTERBAUGH, ROGER P. KING,)
JOHN A. MEYER, ERNEST C. WHALEN,)
WAYNE P. PUTERBAUGH, MICHAEL E.)
WRIGHT, G.W. KRATZ, D.V. ARVIN,)
R.J. THOMASON, RUSSELL L. STARKEY,)
DALE QUANTE, BILL DANIEL, JAMES)
ASTROWSKI, RAYMOND L. RICHIE,)
E.L. MCDANIEL, GEORGE W. NANCE,)
STEVEN P. BLACK, M.D. LORTON,)
E.C. GODDARD, JOHN N. ANTHONY,)
DONALD E. MURRY, LEWIS D. CURRENT)
LARRY D. FLATT, RAYMOND STENGEL,)
TOMMY W. COOK, MICHAEL A. BONE,)
MICHAEL W. CHEEK, BARNEY E.)
HALL, WILLIAM C. CONRAD, CHARLES)
STALLINGS, DONALD BATIS, ROGER)
L. STEGMAN, JOSEPH SCHROETER,)-
T. J. AKINS and J.P. LEMP,)

NOTICE OF ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, IL 60604

Dated: November 8, 1989

By the Court:

No. 89-2070

DAVID L. PRIDE, ROBERT D WARNER, VINCENT CHANDLER, P.L. FOURCAULT, TERRY L. RIGGS, DENNIS HEERIN, JAMES P. WALDRON, BUFORD R. CLARKE, JR., LOU A. JETHRO, LAVERNE LUTHY, ALAN HAGLER, JAMES W. JACKSON, NORMAN F. JOHNSON, MERL L. PENROD, FRANK A WOOLF, JR., NORMAN W. LANGE, LINDELL R. GOTTO, J.D. LEWIS, KENNETH COLEMAN, F.E. GRISSON, LARRY R. GREENWOOD, MICHAEL L. VALENTINE, FORREST NELSON, ROBERT HOOTEN, RONALD L. WHITAKER, CONRAD N. ARNOLD, DONALD D. WILLIAMS, GEORGE R. VINSON, WILLIAM L. BECKER, LEROY SHEA, LARRY D. HARPER, H.C. GREENLEY I..E. HARTLINE, T.G. CAMPBELL, WARREN E. LAWRENCE, DAVID LEUTY, WILLIAM M. MILLER, THEODORE J. WIDEL, RORY G. PERRY, S. JOHNSON, VERNON J. LEE, JAMES R. MAYS, E.D. DORSON, J.E. HARRISON, ARCHIE L. WATTS, JR., WILLIAM H. LEE, NORMAN F. RUF, MARK S. NICHOLSON, JAMES E. BOATRIGHT, G.E. ISOM, RONNIE D. ELLET,

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Plaintiffs - Appellants

V.

VENANGO RIVER CORPORATION, CHICAGO AND WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL GULF RAILROAD COMPANY, IC INDUSTRIES, INCORPORATED, also known as WHITMAN CORPORATION, HARRY BRUCE, HENRY BORGSMILLER and RICHARD BESSETTE,

Defendants - Appelles

Appeal from the United States District Court for
Southern District of Illinois, Alton Division
No. 89 C 5012, Judge William L. Beatty.

IT IS HEREBY ORDERED that this case be set down for oral argument on Wednesday, December 13, 1989, in the Courtroom of the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn, Room 2721, Chicago, Illinois at 9:30 A.M.

IT IS FURTHER ORDERED that oral argument in said case will be no more than 15 minutes for each side. Should counsel determine that they do not require the amount of time allotted, they are free to waive any portion thereof. Counsel are advised that the panel of judges assigned to oral argument may decide after reading the briefs that less time is required for oral argument.

Copies of this notice have been sent to Counsel of record.

NOTE: Pursuant to Circuit Rule 34(a) who are to present argument in this matter are hereby required to notify the Clerk's Office (312-435-5850) of such fact no later than two business days prior to the scheduled date of such oral argument. This must

be done by completing and returning the enclosed postcard. Divided arguments on behalf of a single party or multiple parties with the same interests are not favored by the Court. However, if more than one counsel will appear on the side, such fact must also be made clear. See Circuit Rule 34(c).

Any requests for waiver or postponement of a scheduled oral argument must be made by formal motion, with proof of service on all other counsel or parties. Postponements will be granted only in extraordinary circumstances. See Circuit Rule 34(c).

The judges may decide to render an oral decision from the bench.

FILED
APR 10 1991
OFFICE OF THE CLERK

No. 90-1434

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID L. PRIDE, *et al.*,
Petitioners,

v.

VENANGO RIVER CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, WHITMAN CORPORATION (formerly known as IC INDUSTRIES, INC.), HARRY BRUCE, HENRY BORGSMILLER, and RICHARD BESSETTE,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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April 10, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

CORPORATE AFFILIATIONS

Illinois Central Railroad Company

The Illinois Central Railroad is a wholly owned subsidiary of Illinois Central Corporation. The subsidiaries and affiliates of Illinois Central Railroad, excluding wholly-owned subsidiaries, are as follows:

Peoria & Pekin Union Railway Co.
Paducah & Illinois Railroad Co.
Mississippi Export Railroad Co.
Terminal Railroad Assoc. of St. Louis
Belt Railway Co. of Chicago
Trailer Train Company

Whitman Corporation

The subsidiaries and affiliates of Whitman Corporation, excluding wholly-owned subsidiaries, are as follows:

Pepsi-Cola General Bottlers, Inc.

Genadco Advertising Agency, Inc.
Kolmar Products Corporation
Pepsi-Cola General Bottlers of South Bend, Inc.
Pepsi-Cola General Bottlers of Brookville, Inc.
Pepsi-Cola General Bottlers of Virginia, Inc.
Pepsi-Cola General Bottlers of Princeton, Inc.
Pepsi-Cola General Bottlers of Toledo, Inc.
Pepsi-Cola General Bottlers of Bryan, Inc.
Pepsi-Cola General Bottlers of Dover, Inc.
Pepsi-Cola General Bottlers of Muncie, Inc.
Pepsi-Cola General Bottlers of Ft. Wayne, Inc.
Pepsi-Cola General Bottlers of Lima, Inc.
Pepsi-Cola General Bottlers of Memphis, Inc.
Pepsi-Cola Bottling Co. of Bloomington, Inc.
Pepsi-Cola Bottling Co. of Oshkosh, Inc.
Marquette Bottling Works
Northern Michigan Vending, Inc.
Beverage Bottlers, Inc.
Four Star Leasing, Inc.
Lougen Limited

Hussmann Tempcool Holdings PTE Limited

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Fed. R. App. P. 3(c) ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1434

DAVID L. PRIDE, *et al.*,

Petitioners,

v.

VENANGO RIVER CORPORATION, ILLINOIS CENTRAL RAILROAD COMPANY, WHITMAN CORPORATION (formerly known as IC INDUSTRIES, INC.), HARRY BRUCE, HENRY BORGSMILLER, and RICHARD BESSETTE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

This case involves the simple yet fundamental requirement that all parties who wish to appeal from a district court decision must identify themselves unambiguously in the notice of appeal. *See* Fed. R. App. P. 3(c) (hereinafter "Rule 3(c)"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). The United States Court of Appeals for the Seventh Circuit dismissed the appeal below because the caption of Petitioners' Notice of Appeal identified the appellants only as "David L. Pride, et al." and the body of the notice named only "the plaintiffs."

Petitioners assert that their notice would not have been dismissed under the standards articulated in *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), and *National Center for Immigrant Rights v. INS*, 892 F.2d 814 (9th Cir. 1989) ("*NCIR*"), *later appeal*, 913 F.2d 1350 (9th Cir. 1990), *petition for cert. filed*, 59 U.S.L.W. 3503 (U.S. Jan. 7, 1991) (No. 90-1090). Accordingly, assert Petitioners, there is a conflict among the Circuits. Not so. The Sixth Circuit reversed its position nearly a year ago in an *en banc* decision. The Ninth Circuit decision Petitioners cite was based entirely on the Sixth Circuit's prior, now-discredited panel decision, and is therefore of questionable precedential value. In short, Petitioners' asserted conflict is rapidly resolving itself.

Alternatively, Petitioners assert that a conflict exists between the holding of the Seventh Circuit in this case and that of the Fifth Circuit in *Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d 1463 (5th Cir.), *cert. denied*, 111 S. Ct. 131 (1990), allowing deficiencies in a notice of appeal to be cured by the filing of a motion for stay pending appeal that accurately identifies all appellants. Upon closer examination, this asserted conflict also vanishes. The collateral document relied upon here is a Certificate of Interest. Such a document would not have been accepted even in the Fifth Circuit to "cure" the deficiency in Petitioners' Notice of Appeal.

This Court has consistently denied post-*Torres* petitions raising these precise issues.[1] This petition presents no reason for a different result.

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[1] *See, e.g., Kunkle v. Fulton County Bd. of Comm'rs, cert. denied*, 59 U.S.L.W. 3562 (U.S. Feb. 19, 1991) (No. 90-884); *Griffith v. Johnston, cert. denied*, 59 U.S.L.W. 3462 (U.S. Jan. 8, 1991) No. 90-546); *Mayeske v. International Ass'n of Fire Fighters, cert. denied*, 111 S. Ct. 347 (1990) (No. 90-402); *Davis v. Tennessee Dep't. of Employment & Sec., cert. denied*, 111 S. Ct. 210 (1990) (No. 90-169); *Fraige v. American National Watermattress Corp.*,

REASONS FOR DENYING THE WRIT

THE PETITION FAILS TO DEMONSTRATE A GENUINE CONFLICT AMONG THE COURTS OF APPEALS

A. The Decision On Which Petitioners Principally Rely Has Been Reversed

Petitioners argue that the Seventh Circuit's ruling that reference in a notice of appeal to "the plaintiffs" is insufficient for purposes of Rule 3(c) is in conflict with two decisions from other Circuits—*Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), and the *NCIR* decision from the Ninth Circuit. The purported conflict in fact stems primarily from *Ford v. Nicks*. As the Petition itself indicates, the Ninth Circuit's decision in *NCIR* relied heavily on the *Ford v. Nicks* panel decision. Indeed, *Ford v. Nicks* was virtually the only authority cited in the Ninth Circuit's decision, and the Ninth Circuit plainly stated it was following the reasoning and result of that case. *See* 892 F.2d at 816-17.

Ford v. Nicks, however, is no longer good law. Petitioners fail to acknowledge that in an *en banc* decision issued six months before the decision below, and nine months before their petition was originally filed in this Court, the Sixth Circuit unequivocally rejected *Ford v. Nicks* and specifically held that use of a generic phrase such as "the plaintiffs" or "the defendants" is not sufficient to identify the appellants for purposes of Rule 3(c). *Minority Employees Tenn. Dep't of Employment Sec., Inc. v. Tennessee Dep't of Employment Sec.*, 901 F.2d 1327, 1330 (6th Cir.), *cert. denied*, 111 S. Ct. 210 (1990).

Petitioners' asserted conflict is therefore rapidly vanishing. The Sixth Circuit has harmonized its law on this

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cert. denied, 59 U.S.L.W. 3247 (U.S. Oct. 2, 1990) (No. 90-136); *Barnett v. Petro-Tex Chem. Corp.*, *cert. denied*, 110 S. Ct. 3274 (1990) (No. 89-1761).

issue with the Seventh Circuit, as well as at least five other circuits that have considered this question.[2] As noted above, the Ninth Circuit's decision in *NCIR* relied virtually exclusively on the Sixth Circuit's now-discredited analysis. The reversal of *Ford v. Nicks* completely undermines *NCIR*, and the Ninth Circuit should be given adequate opportunity to reconsider its position.

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[2] *First Circuit*:

Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 317 (1st Cir. 1989) (en banc);

Fifth Circuit:

Barnett v. Petro-Tex Chem. Corp., 893 F.2d 800, 805 (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990);

Tenth Circuit:

Pratt v. Petroleum Prod. Management, Inc. Employee Sav. Plan & Trust, 920 F.2d 651, 654-55 (10th Cir. 1990); *Laidley v. McClain*, 914 F.2d 1386, 1388-89 (10th Cir. 1990);

Eleventh Circuit:

Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158, 161 (11th Cir. 1988);

D.C. Circuit:

Mayeske v. International Ass'n of Fire Fighters, 905 F.2d 1548, 1549 n.1 (D.C. Cir.), *cert. denied*, 111 S. Ct. 347 (1990).

The Second Circuit's position is not yet entirely clear. In *Baylis v. Marriott Corp.*, 906 F.2d 874 (2d Cir. 1990), the court accepted a notice stating that "all of the plaintiffs" appealed, on the ground that including the word "all" left no ambiguity as to which plaintiffs intended to appeal. This decision is of no use to Petitioners here, who named only "the plaintiffs," providing no guidance as to *which* plaintiffs were appealing. In two *per curiam* decisions, motions panels in the Second Circuit appear to have reached conflicting results when faced with language closer to the case at hand. *Compare Shatah v. Shearson/American Express, Inc.*, 873 F.2d 550 (2d Cir. 1989) ("the parties" insufficient), *with Association of Am. Medical Colleges v. Cuomo*, 913 F.2d 55 (2d Cir. 1990), *rev'd and vacated on merits*, 1991 WESTLAW 32263 (2d Cir. Mar. 12, 1991) ("the defendants," referring to eighteen state officials sued in their official and individual capacities, sufficient). This ambiguity should be addressed and resolved by the Second Circuit itself in future cases.

Indeed, it was apparently not until December 19, 1990, that the Ninth Circuit acknowledged the Sixth Circuit's decision in *Minority Employees*, *see United States ex rel. Blue Circle West, Inc. v. Tucson Mechanical Contracting, Inc.*, 921 F.2d 911, 914 (9th Cir. 1990), and there is still no indication that the Ninth Circuit has been given an opportunity to acknowledge that this decision destroys the underpinnings of *NCIR*. The Ninth Circuit has not been expansive in its treatment of notices of appeals in any other respects. The Circuit follows the general post-*Torres* rule that parties "not identified by name in the notice of appeal are not parties to [the] appeal," *Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549, 1551 n.1 (9th Cir. 1990).[3] There is sufficient room within the Ninth Circuit's own opinions, therefore, to allow the Circuit to harmonize its rules with those of the remainder of the Circuits.

B. Petitioners' Attempt to "Cure" Their Inadequate Notice of Appeal Would Be Insufficient In Any Circuit

The Fifth Circuit has "closely followed" *Torres* and recognizes that "failing to name a party on a notice of appeal results in a failure of that party to appeal," *Morales v. Pan Am. Life Ins. Co.*, 914 F.2d 83, 85 (5th Cir. 1990), but has stated that in certain "limited situations" the court may interpret "et al." on a notice of appeal to include additional parties than those named. The "limited situation" Petitioners seek to invoke here is when appellants all are individually listed in a motion or supporting memorandum for stay pending appeal, filed within thirty days of entry of judgment in the district court. *See id.* at 85 (dicta) (*citing Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d 1463, 1465

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[3] *See also United States v. Tucson Mechanical Contracting, Inc.*, 921 F.2d at 914 ("et al." insufficient); *Sauceda v. Washington State Department of Labor & Indus.*, 917 F.2d 1216 (9th Cir. 1990) (reference to "plaintiffs" in body of notice insufficient, where caption specifically named other plaintiffs without use of "et al.").

(5th Cir.), *cert. denied*, 111 S. Ct. 131 (1990)). The *Carmen* panel held that such a document can serve as the "functional equivalent" of the missing notice. For purposes of this Petition, however, it is *not* correct to assume, as Petitioners do, that their Notice of Appeal would have survived even in the Fifth Circuit under the *Carmen* rationale.

In the only two cases in which the Fifth Circuit allowed another document to "cure" a failure to identify the appellants, that document was either a motion or a memorandum supporting a motion for a stay pending appeal in which all appellants were specifically named. *See Warfield v. Fidelity & Deposit Co.*, 904 F.2d 322, 325 (5th Cir. 1990); *Brotherhood of Ry. Carmen v. Atchison, T. & S.F. Ry.*, 894 F.2d at 1465. A motion for stay, like the notice of appeal, is an operative, substantive document seeking relief from the court of appeals in its appellate capacity.

In contrast, the Fifth Circuit has specifically held that a counsel's appearance form is *not* the "equivalent" of a notice of appeal and cannot "rescue" a defective notice. *Barnett v. Petro-Tex Chem. Corp.*, 893 F.2d 800, 804 (5th Cir.), *cert. denied*, 110 S. Ct. 3274 (1990); *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir. 1988). *See also Goos v. ICC*, 911 F.2d 1283, 1289 (8th Cir. 1990). The document Petitioners offer, a certificate of interest, was filed together with counsel's appearance form but is even more tenuously related to a notice of appeal than an appearance form. By its terms, the purpose of the certificate of interest is "[t]o enable the judges to determine whether recusal is necessary or appropriate." *See* Petition at C-19. This document is not directed at other parties and is neither designed nor intended to provide them with the notice required by Rule 3(c). Nor could it unambiguously serve that purpose. A cautious appellant might well provide the names of all parties ever involved in the litigation, appellants or not, to enable the court to

avoid even "the appearance of impropriety." Canon 2, Code of Judicial Conduct.

In short, Petitioners cannot show that the outcome of their attempted "cure" would have been any different in the Fifth Circuit from the outcome in the Seventh.[4] This case is not an appropriate vehicle to consider whether collateral documents may "cure" a defective notice of appeal.

CONCLUSION

The prevailing approach to Rule 3(c), as exemplified by the decision below, is a simple and sensible one consistent with the task at hand. It is not too much to ask that all of the items specified by Rule 3(c) be contained unambiguously in the notice of appeal. Petitioners here, for example, had ample instruction not only from this Court but also from the Seventh Circuit on the requirements for notices of appeal. *See Pride v. Venango River Corp.*, 916 F.2d 1250, 1253 (7th Cir. 1990). The alternative, more diffuse approach advocated by petitioners, involving not only imprecise language in the notice but also indeterminate types and combinations of separate documents, can lead only to more divergences from the rule and more uncertainty and controversy concerning appeals.

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[4] Few courts to date have addressed this issue. As the *Goos* case cited in the text indicates, the Eighth Circuit (like the Seventh) does not accept the "cure" theory regardless of the document offered. The Third Circuit's position is far from clear. *Compare Cruz v. Melendez*, 902 F.2d 232, 236 (3d Cir. 1990) *with Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 665-66 (3d Cir. 1990). That Circuit should be given additional opportunities to consider the matter. The Tenth Circuit has held that a docketing statement filed before the time to appeal had expired may cure a defective notice. *Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 772 (10th Cir. 1991). Petitioners' certificate of interest bears no more resemblance to a docketing statement than to a motion for stay pending appeal, however, and once again the Petitioners cannot demonstrate that their fate would have been different in a different Circuit.

Accordingly, and for the reasons set forth above, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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